Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JACK S. SPEARS
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF LOUISIANA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Judgment rendered September 27, 2006
Application for rehearing may be filed within the delay allowed by Art. 922, La. C.Cr.P.
****
On Remand
****

No. 39,302-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

****

STATE OF LOUISIANA Appellee

versus

JACK S. SPEARS Appellant

****

On Remand from the
Louisiana Supreme Court

Originally appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 46498
Honorable Cynthia T. Woodard, Judge

****

BOBBY L. CULPEPPER — Counsel for Appellant

ROBERT W. LEVY
District Attorney — Counsel for Appellee

CLIFFORD R. STRIDER, III
PAMELA A. STEWART
Assistant District Attorneys

****

Before BROWN, WILLIAMS and DREW, JJ

WILLIAMS, J.

The defendant, Jack S. Spears, was convicted of misapplication of construction contract payments, a violation of LSA-R.S. 14:202. The defendant was sentenced to serve a prison term of four years at hard labor and ordered to pay a fine of $500 and all costs of the proceedings. The defendant was also ordered to pay $103,804.22 in restitution as a condition of parole.

On appeal, we reversed the defendant's conviction and sentence and entered a judgment of acquittal. The supreme court reversed our ruling and remanded this matter for our consideration of the defendant's remaining assignments of error. For the reasons that follow, we affirm the defendant's conviction and sentence.

FACTS

Richard Joe Kirkham, Jr. and Karen Walker Kirkham ("the Kirkhams") were engaged in the business of raising chickens in Choudrant, Louisiana. In December 1999, the Kirkhams entered into a contract with the defendant, who was doing business as Spears Construction Company, Inc. to build two chicken houses for a price of $196,000. The Kirkhams obtained a mortgage to finance the construction. The contract specified that payment would be made in intermittent draws, contingent upon the completion of particular stages of construction.

Construction began on the project, and the first three draws were paid without difficulty. After the third payment, little or no further work was done on the project, despite a written demand by the Kirkhams to the defendant to complete the project. Although he had not completed the required stage of construction, the defendant demanded the fourth payment. When the Kirkhams refused to authorize the draw, the defendant walked off of the job. The defendant returned when the Kirkhams finally agreed to authorize the payment. By the end of April, 2000, construction on the chicken houses had ceased.

The Kirkhams began to receive material and labor lien notices from suppliers and workers on the project. On May 9, 2000, the Kirkhams filed a complaint with the Lincoln Parish Sheriff's Department, reporting that the defendant had

misappropriated funds under the construction contract.

The defendant was arrested and charged by bill of information with misapplication of contract funds over $1,000. The bill of information was later amended to charge the defendant with misapplication of construction contract funds in an amount in excess of $10,000.

A jury found the defendant guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal, motion in arrest of judgment and motion for a new trial. Noting that the defendant had two prior felony convictions, both involving crimes of economic gain, the trial court sentenced the defendant to serve a prison term of four years at hard labor. Additionally, he was ordered to pay $103,804.22 in restitution for misapplied payments, a $500 fine and all costs of the proceedings. The court denied the defendant's oral motion to reconsider the sentence.

The defendant appealed. Concluding that the evidence was insufficient to support a conviction, we reversed the defendant's conviction and sentence and entered a judgment of acquittal. *State vs. Spears*, 39,302 (La. App. 2d Cir. 3/17/05), 896 So. 2d 1280. The Louisiana Supreme Court granted the state's application for writ of certiorari, reversed our ruling and remanded this matter "for consideration of the defendant's remaining assignments of error predetermined on original appeal." *State vs. Spears*, 2005-0964 (La. 4/4/06), 929 So. 2d 1219, 1224.

DISCUSSION

Constitutionally of LSA-R.S. 14:202

The defendant contends that the trial court erred in overruling his motion to quash the bill of information and motion in arrest of judgment, in which he argued that LSA-R.S. 14:202[1] was unconstitutional. In the motion to quash, the defendant argued that the provisions of the statute fail to put persons on notice of the activities prohibited under the statute.2 Following his conviction, the defendant filed a motion in arrest of judgment, asserting the same claim.

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[1] LSA-R.S. 14:202 provides:

Contractors; misapplication of payments prohibited; penalty.

A. No person, contractor, subcontractor, or agent of a contractor or subcontractor, who has received money on account of a contract for the construction, erection, or repair of a building, structure, or other improvement, including contracts and mortgages for interim financing, shall knowingly fail to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract.

B. When the amount misapplied is one thousand dollars or less, whoever violates the provisions of this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not less than ninety days nor more than six months, or both.

C. When the amount misapplied is greater than one thousand dollars, whoever violates this Section shall be fined not less than one hundred dollars nor more

then five hundred dollars, or imprisoned with or without hard labor for not less than ninety days nor more than six months, or both, for each one thousand dollars in misapplied finds, provided that the aggreggate imprisonment shall not exceed five years.

D. Any person, contractor, subcontractor, or agent of a contractor or subcontractor who knowingly fails to apply construction contract payments as required in Subsection A shall pay to the court, and the court shall transfer to the person whose construction contract payments were misapplied, an amount equal to the sum of the payments not properly applied and any additional legal costs resulting from the misapplication of construction and fund payments, including a fee charged by the clerk of court for handling such payments.

2LSA-C.C.Cr.P. art. 532(1) provides in pertinent part:

A motion to quash may be based on one or more of the following grounds:

(1) The indictment fails to charge an offense which is punishable under a valid statute.

Louisiana law mandates that the Attorney General be served with a copy of the pleading challenging a statute's constitutionality so that the Attorney General can elect whether or not to exercise his statutory right to represent the state's interest in the proceedings. LSA-R.S. 13:4448; *State vs. Citizen*, 2004-1841 (La. 4/1/05), 898 So. 2d 325; *State vs. Schoening*, 2000-0903 (La. 10/17/00), 770 So. 2d 762; *State vs. Shumaker*, 40,275, (La. App. 2d Cir. 10/28/2005), 914 So. 2d 1156.

In this case, notice has been sent to the attorney general by this court, as mandated by LSA-R.S. 13:4448. At the time of this opinion, no response had been received. In any event, the defendant's argument that LSA-R.S. 14:202 is unconstitutional is without merit.

In State vs. Piazza, 596 So. 2d 817 (La. 1992), the district court quashed the defendant's indictment for violation of LSA-R.S. 14:202, declaring the statute unconstitutional. The Louisiana Supreme Court reversed the district court's ruling and upheld the validity of the statutory provisions, stating "[T]he conflicting penalty provisions of Section 202 do not render the statute unconstitutional, but may be construed together so as to give effect to both provisions, resolving any conflict in favor of the person on whom the penalty is imposed by applying the lesser penalty." Id. At 818.3 The court further noted, "The present case does not involve a conflict in the portion of the criminal statute which defines the conduct that will be considered criminal, but rather involves a conflict in the penalty portion of the statute." Id. at 820.

In the instant case, the main thrust of the defendant's constitutional argument involves an alleged vagueness in the "criminal portion" of LSA-R.S. 14:202, i.e., the provisions of the statute fail to put persons on notice with regard to what activities are prohibited. The defendant further presented a list of hypothetical facts in which the statute would not give notice of a crime.

To determine the constitutionality of a statute, we must follow the basic rules of statutory construction. *State vs. Shumaker, supra.* A statute is presumed to be constitutional, and the burden of clearly establishing unconstitutionality rests upon the party who attacks the statute. *State vs. Cunningham*, 2004-2200 (La. 6/13/05), 903 So. 2d 1110. A statute should be upheld whenever possible. *State vs. Shumaker, supra.*

To prove that a law is unconstitutional, a defendant is required to show that an ordinary person of reasonable intelligence could not understand and follow the law. *State vs. Hair*, 2000-2694 (La. 5/15/01), 784 So. 2d 1269. Broad language is not in itself vague, particularly where it is clear that the legislature intended to make criminal all acts of a certain kind. Id. Louisiana criminal statutes must be "given genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." LSA-R.S. 14:3.

3In Piazza, supra, it was apparent that the Louisiana Attorney General appeared to represent the interests of the state with regard to the penalty provisions of the statute.

LSA-R.S. 14:202 provides, in pertinent part, "No person . . ., who has received money on account of a contract for the construction, erection or repair of a building, structure, or other improvement, . . . shall knowingly fail to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract."

A plain reading of the activity prescribed by the statute is sufficiently narrow and gives adequate notice to those who would engage in such conduct, i.e., fail to apply monies received pursuant to a construction contract as necessary to settle claims for material and labor, that the conduct is prescribed. Thus, we conclude that the defendant failed to meet his burden of clearly establishing that the statute is unconstitutional. This assignment lacks merit.

Amendment of Bill of Information

In another assignment of error, the defendant contends that trial court erred, as a matter of law, in permitting the state to amend the bill of information on the day of the trial. The state argues the amendment was proper and non-prejudicial.

The defendant was originally charged by bill of information with violating LSA-R.S. 14:202, misapplication of payments in an amount greater than $1,000. On July 29, 2003, in open court, before the first prospective juror was called for examination, the state requested leave of court to amend the bill to charge the defendant with the misapplication of payments in am amount greater

than $10,000 under the same statute. The trial court permitted the amendment, over the defendant's objection.

The substance of an indictment may be amended before trial begins. LSA-C.Cr.P. art. 487. In a jury trial, trial begins when the first prospective juror is called for examination. LSA-C.Cr.P. art. 761. If a defendant can show that he has been prejudiced by the amendment to charge against him, he is entitled to a continuance. LSA-C.Cr.P. art. 489. The purpose of the continuance authorized by Article 489 is to protect a defendant from surprise or prejudice which may result from such an amendment. The defendant bears the burden of proving that he has been prejudiced by the amendment. The trial court has great discretion in deciding such matters, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State vs. Ignot,* 29,745 (La. App. 2d Cir. 8/24/97), 701 So. 2d 1001, *writ denied,* 1999-0336 (La. 6/18/99), 745 So. 2d 618; *State vs. Cleveland,* 25,628 (La. App. 2d Cir. 1/19/94), 630 So. 2d 1365.

In this case, the minutes reveal that the state moved to amend the bill of information before any prospective jurors were called for examination. Therefore, the trial court had not commenced, and the state was entitled to amend the bill pursuant to LSA-C.Cr.P. arts. 487 and 761. Further, the defendant's remedy for any potential prejudice was a motion for continuance. However, the defendant did not request a continuance, and he objected to the state's motion to continue.

Additionally, even if the defendant had requested a continuance, the defendant has failed to show that his defense was prejudiced as a result of the amendment to the bill of information. The only change to the bill was the amount of payments the defendant had allegedly misapplied. The defendant knew that he was to be tried for the misapplication of payments, a violation of LSA-R.S. 14:202. Thus, there was no element of surprise. The amount of money involved in the misapplication only affected the penalty upon conviction. Moreover, shortly after the amendment, the trial court continued the trial until October 28, 2003. Thus, the defendant was provided ample time to conduct any further discovery and to file any additional pre-trial motions.

The defendant also argues that the amendment to the bill asserting a misappropriation greater than $10,000 is vague in that it does not reflect a crime. LSA-R.S. 14:202 provides for misapplication of contract funds under $1,000, as well as funds in excess of $1,000. We cannot say that the trial court erred in allowing the amendment to the bill to charge the defendant with misapplication of greater than $10,000, as the amount of the misapplication determines the sentence under the statute.4 Therefore, the defendant's arguments lack merit.

4The state does not provide any explanation as to why it amended the bill of information to contain a dollar amount not included in the statute. A possible explanation is that the sentence for the offense is tied to the amount of the misappropriation, and $10,000 reflects the maximum sentence of five years.

Arraignment

The defendant also contends the trial court erred by failing to arraign him on the amended bill of information. The state maintains that the defendant waived this argument because he did not object to the court's failure to rearraign him.

LSA-C.Cr.P. art. 555 provides:

> Any irregularity in the arraignment, including a failure to read the indictment, is waived if the defendant pleads to the indictment without objecting thereto. A failure to arraign the defendant or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty.

In this case, the defendant did not object to the failure to arraign him on the amended charge before the trial commenced. Thus, the issue is waived. See, *State vs. Ignot, supra.* This argument lacks merit.

Motion to Continue

Next, the defendant contends the trial court erred, as a matter of law, in granting the state's motion for a continuance on the date of the trial, as the motion was not filed at least seven days prior to the commencement of trial as required by LSA-C.Cr.P. art. 707. The defendant also argues that the trial court erred in granting the continuance after the trial had commenced.

The record shows that on the morning of July 29, 2003, a panel of fourteen potential jurors was called, sworn and questioned. Following a recess, the state notified the trial court that one of its witnesses, Debbie Spears, was refusing to appear and testify because of her alleged fear of the defendant. The state made an oral motion for continuance, which was granted by the trial court over the defendant's objection.

A motion for continuance must be filed at least seven days prior to the commencement of the trial. LSA-C.Cr.P. art. 707.5 Nevertheless, in the interest of justice, the trial court may grant a continuance upon written motion at any time after a contradictory hearing. *State vs. Winfrey,* 1997-427 (La. App. 5th Cir. 10/28/97), 703 So. 2d 63.

LSA-C.Cr.P. art. 708 makes a distinction between a "continuance" and a "recess," as follows:

> A continuance is the postponement of a scheduled trial or hearing, and shall not be granted after the trial or hearing has commenced. A recess is a temporary adjournment of a trial or hearing that occurs after a trial or hearing has commenced.

In this case, the minutes reveal that the state moved for a continuance after the first panel of potential jurors had been called, sworn and questioned. Thus, the trial had already commenced, and the state was required to request a recess.

It is well settled that whether the motion was improperly styled as one of continuance or recess, the court may examine the motion as thought it had been properly denominated. *State vs. White*, 389 So. 2d 1300 (La. 1980); *State vs. Bertrand*, 381 So.2d 489 (La. 1980); *State vs. Dickinson*, 370 So. 2d 557 (La. 1979); *State vs. Mizell*, 341 So.2d 385 (La. 1976). Thus, although the motion may have been improperly styled as one for "continuance," it can be reviewed as if it had been properly named as one for recess. *State vs. Dooley*, 38,763 (La. App. 2d Cir. 9/22/04), 882 So.2d 731, *writ denied*, 2004-2645 (La. 2/18/05), 896 So. 2d 30; *State vs. Smith*, 25,841 (La. App. 2d Cir. 02/23/94), 632 So. 2d 887.

5A motion for continuance must be in writing but, under extenuating circumstances, an oral motion is sufficient. *State vs. Owens*, 30,903 (La. App. 2d Cir. 9/25/98) writ denied, 1998-2723 (La. 2/5/99), 737 So. 2d 747.

The standard of review of a motion for recess is the same as the review of a motion for a continuance. *State vs. White, supra; State vs. Dooley, supra.* The granting or denial of a motion for continuance or a motion for recess is within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal absent a showing of abuse and specific prejudice. LSA-C.Cr.P. art. 712; *State vs. Martin*, 1993-0285 (La. 10/17/94), 645 So. 2d 190; *State vs. Dooley, supra; State vs. Gipson*, 28,113 (La. App. 2d Cir. 6/26/96), 677 So. 2d 544, *writ denied*, 1996-2303 (La. 1/31/97) 687 So.2d 402.

LSA-C.Cr.P. art. 709 provides:

> A motion for a continuance based upon the absence of a witness must state:
>
> (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;
>
> (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and
>
> (3) Facts showing due diligence used in an effect to procure attendance of the witness.

In this case, the record shows that although the state had not subpoenaed Ms. Spears, she and her attorney had assured the state that she would be present at trial. The state asserted that Ms. Spears was expected to provide material testimony which regard to the defendant's banking records. After securing Ms. Spears' voluntary agreement to testify, the state remained in constant contact with her and her attorney, and travel arrangements had been completed. However, the defendant, via telephone calls, had instructed her not to come to trial, and allegedly, made various threats to her. Defense counsel admitted that he and the defendant had spoken to Ms. Spears. Defense counsel informed Ms. Spears that she was not required to appear at the trial and testify because she had not been subpoenaed. Ms. Spears then rescinded her

agreement to testify. In its argument to the trial court, the state assured the court that Ms. Spears would be available to testify at a future date. Only on the day of trial did the state lean that the witness was refusing to appear, stating threats by the defendant as the reason.

Under these extenuating circumstances, we cannot say that the trial court abused its discretion in granting a recess. The trial court was satisfied by the state's allegations that the defendant had played a role in Ms. Spears' failure to appear.6
There is nothing in the record to show that the trial court abused its discretion or that the defendant was prejudiced by the delay. Therefore, this assignment of error is without merit.

The Kirkhams' Testimony

The defendant also contends the trial court erred in allowing Richard Kirkham to testify with regard to the cost of completing the project and the provisions of the contract. He further contends that the trial court erred in allowing Karen Kirkham to testify concerning their financial difficulties, her efforts to contact the defendant and that the defendant was "driving a brand new truck."

6In granting the state's motion, the trial court forbade the defendant from initiating any contact with Ms. Spears as a condition of his bail.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403.

A trial judge is vested with wide discretion in determining the relevancy of evidence; his ruling will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. *State vs. Miles*, 402 So.2d 644 (La. 1981); *State vs. Jackson*, 30,473 (La. App. 2d Cir. 5/13/98), 714 So. 2d 87, *writ denied*, 1998-1778 (La. 11/6/98), 714 So. 2d 87.

In this case, the defendant has not shown how the Kirkhams' testimony with regard to the defendant's failure to complete the project and the consequences of that failure was irrelevant in determining if funds were misapplied, as well as the defendant's intent with regard to those funds. However, it may well be that the testimony that the defendant was driving a new truck had no relevance to the case. The defendant objected and moved for mistrial, asserting the testimony prejudiced his case to the extent that he was unable to receive a fair trial. As the state correctly points out, the defendant did not request an admonition to the jury. Moreover, the defendant has failed to show how the trial court's ruling prejudiced his case. The defendant's argument lack merit.

Jury Instructions

The defendant further assigns as error the trial court's failure to give jury instructions as requested by the defense. Specifically, the defendant submitted 24 special requests for jury instructions, and the trial court denied all but one of those proposed instructions. The defendant contends the trial court erred in denying his request for 13 of the proposed charges.

Under our law, the state and the defendant had the right to submit to the court special written charges for the jury. LSA-C.Cr.P. art. 807; *State vs. Gipson, supra.* The requested charge shall be given if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. Id. However, the trial court is not required to give the requested special charge if it is included in the general charge or in another special charge to be given. LSA-C.Cr.P. art. 807. Any requested special charge must be supported by the evidence. *State vs. Craig*, 1995-2499 (La. 5/20/97), 699 So. 2d *cert. denied*, 522 U.S. 935, 118 S. Ct. 343, 139 L.Ed.2d 266 (1997).

In this case, the trial court declined to include proposed jury instruction numbers 1, 7, 10 and 11, stating that there is no basis in the law which would support those propose charges. With regard to proposed jury instruction numbers 2, 4, 6, and 8, the trial court declined to include the instructions based upon his finding that the cases cited by the defendant were inapplicable to the instant case.

With regard to proposed jury instruction number 9, the trial court concluded that the statute cited by the defendant is a civil statute and is not applicable in criminal matters. The trial court disallowed proposed instructions numbers 12,13, and 14, concluding that those provisions of the statute refer to the penalty for the offense and restitution, matters which are within the discretion of the judge, rather than the jury.

We have carefully reviewed the instructions requested by the defendant in light of the instructions actually given by the trial judge. Each of the instructions requested by the defendant was either included in the trial judge's instructions or was an incorrect statement of the law which would have required correction or further explanation. Therefore, the trial judge did not err in refusing to give the requested jury instructions.

Further, errors in jury instructions are subject to the harmless error analysis. Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State vs. Tate*, 2001-1658 (La. 5/20/03), 851 So.2d 921, cert. denied, 541 U.S. 905, 124 S.Ct. 1604, 158 L.Ed.2d 248 (2004).

In the instant case, the defendant has made no argument that his rights were substantially violated by the omission of the proposed jury instructions or that he was in any way prejudiced. Thus, we conclude that the defendant's argument that the

trial court erred in omitting the proposed jury instructions is without merit.

Motion for New Trial

The defendant also assigns as error the trial court's denied of his motion for a new trial. According to the defendant, he was entitled to a new trial because the misapplication of construction funds over $10,000 is not delineated in LSA-R.S. 14:202 as a violation of the law.

> In *State vs. Oliver*, 2003-1589 (La. App. 3d Cir. 6/16/04), 879 So. 2d 286, the court stated:
>
> [T]he penalty for a violation of La. R.S. 14:202 is determined based on the total amount misapplied. The bill of information in the case at bar does not specify whether the defendant was charged under section (B) or (C) of La. R.S. 14:202. Although value was discussed at trial and the jury returned a verdict finding a specific value, the bill of information did not properly charge the grade of the offense.
>
> While La. Code.Crim.P. art. 470 does not require that an indictment include a specific monetary value, the allegations in the indictment must be sufficient to determine the grade of the offense.

Id. at 287.

In the instant case, the amended bill of information charged the defendant as follows:

> JACK S. SPEARS committed the offense of misapplication of payments, as set forth in R.S. 14:202, in that he did, being a contractor, receive money on account of a contract with RICHARD KIRKHAM, JR. AND KAREN MICHELLE WALKER, for the construction or improvements of a building and did knowingly fail to apply the money received as necessary to settle claims for materials and labor due the construction or under the contract, said misapplication being greater than $10,000.

Although the bill of information did not specify whether the defendant was being charged under section (B) or (C) of the statute, it is clear from the specific language, "said misapplication being greater than $10,000" that the defendant was being charged under LSA-R.S. 14:202(C), since the amount at issue was "greater than one thousand dollars." Thus, the allegations in the bill of information were sufficient to determine the grade of the offense charged.

The defendant also argues that he was entitled to a new trial because the jury instructions and jury verdict form failed to provide for a determination of the amount of contract funds misapplied.

The record shows that the trial court read the bill of information to the jury verbatim, including the charge of misapplication of funds being greater than $10,000. The trial court also specifically instructed the jury that in order to convict the defendant of the offense charged, it must find, beyond a reasonable doubt, that the state proved every essential element

of the offense. The trial court proceeded to detail the elements of the offense and instructed the jury with regard to responsive verdicts, including, guilty as charged; guilty of misapplication of payments of $1,000 or less; or not guilty. At no time during the proceedings did the defendant argue that either the bill of information, the jury instructions or jury verdict was invalid due to the jury's failure to determine the amounts of funds misapplied. Nor did the defendant move for a mistrial. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. LSA-C.Cr.P. art. 841; *State vs. Bosley*, 29,253 (La. App. 2d Cir. 4/2/97), 691 So. 2d 347, *writ denied*, 1997-1203 (La. 10/17.97), 701 So. 2d 1333; *State vs. Hamilton*, 594 So. 2d 1376 (La. App. 2d Cir. 1992); *State vs. Brown*, 552 So. 2d 612 (La. App. 2d Cir. 1989), *writ denied*, 558 So. 2d 581 (La. 1990). The appellate court cannot consider an error with a jury charge unless there was a contemporaneous objection or motion for mistrial. *State vs. Neal*, 275 So.2d 765 (La. 1973); *State vs. Lee*, 529 So.2d 853 (La. App. 4th Cir. 1988). Thus, the defendant's assignment of error with regard to the erroneous jury instructions will not be considered by this court.

Motion to Reconsider Sentence

Finally, the defendant contends that the trial court erred in failing to reconsider the sentence, particularly in light of the failure of the jury to determine the specific amount of misapplication in question.

In this case, the defendant was charged with misapplication of funds in the amount greater than $10,000. The jury was provided with a list of responsive verdicts to the crime and could have elected to find the defendant either (1) guilty of misapplication of amount greater than $10,000, (2) guilty of misapplication of payments of $1,000 or less, (3) not guilty. The jury opted to find the defendant guilty as charged.

Neither the language of LSA-R.S. 14:202 nor the relevant jurisprudence requires that a jury determine the *specific* amount of funds misapplied. The language of the statute is clear: when the amount misapplied is $1,000 or less, the penalty is $100 to $500 or imprisonment for 90 days to six months or both. When the amount misapplied is greater than $1,000 the penalty is $100 to $500, imprisonment, with or without hard labor, for 90 days to six months, or both, for each $1,000 in misapplied funds, for a maximum of five years. As stated above, the defendant was charged with misapplication of an amount greater than $10,000 and was found guilty as charged. Therefore, the jury was not required to determine a specific amount of funds misapplied. This assignment lacks merit.

CONCLUSION

For the reasons set forth herein, the defendant's conviction and sentence are affirmed.

AFFIRMED.

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

NO. 2006-K-2704

VS.

JACK S. SPEARS

IN RE: Spears, Jack S.; -- Defendant; Applying for Writ of Certiorari and/or Review, Parish of Jackson, 3rd Judicial District Court Div. A, Nos. 46498; to the Court of Appeal, Second Circuit, No. 39,302-KA

August 31, 2007

Denied.

JLW
PFC
CDK
BJJ
JPV
CDT
JTK

Supreme Court of Louisiana
August 31, 2007

_____
Signed/Deputy Clerk of Court
For the Court

STATE OF LOUISIANA : SUPREME COURT

VERSUS : STATE OF LOUISIANA

JACK S. SPEARS : DOCKET NO. 2006-K-2704

APPLICATION FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes JACK S. SPEARS and with respect, shows and avers as follows:

1.

That the instant Application for Rehearing is filed pursuant to Rule IX of the Rules of this Honorable Court and *State vs. Randall Lowe*, 938 So. 2d 140, 2006-2162 (La. 1/12/07).

2.

That writs were denied in this matter on the 31st day of August, 2007 and the notice was received by undersigned counsel on the 4th day of September, 2007.

3.

That the denial of the writ is contrary to the law and evidence, contrary to the Rules of this Honorable Court and in violation of the due process rights of Jack S. Spears.

4.

That this Honorable Court erred as follows:

(1) In denying the writs on the merits;

(2) Failing to either grant or deny writs for 9&1/2 months, in violation of the Rules of this Honorable Court;

(3) Denying Jack S. Spears due process of law under the U. S. Constitution.

5.

That Jack S. Spears attaches hereto a Memorandum in Support of the instant Application for Rehearing.

WHEREFORE, JACK S. SPEARS prays that a rehearing be granted in this matter and that on rehearing the original decision of the Court be overruled and that the decision of this court be reversed and the conviction of JACK S. SPEARS be overruled and reversed and all charges against JACK S. SPEARS be dismissed.

FURTHER PRAYS for all necessary orders and decrees and for just and equitable relief.

CULPEPPER & CARROLL, PLLC
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525 EAST COURT AVENUE
JONESBORO, LOUISIANA 71251
PHONE: (318) 259-4184
BY: _____
BOBBY L. CULPEPPER
BAR ROLL #4646

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been mailed, this date, in the United States mail, postage prepaid, to Honorable Robert Levy, District Attorney, P. O. Box 777, Ruston, Louisiana, 71273-0777.

Jonesboro, Louisiana, this the _____ day of _____, 2007.

_____
BOBBY L. CULPEPPER

STATE OF LOUISIANA : SUPREME COURT

VERSUS : STATE OF LOUISIANA

JACK S. SPEARS : DOCKET NO. 2006-K-2704

MEMORANDUM IN SUPPORT
OF APPLICATION FOR REHEARING

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

Ricky and Karen Kirkham entered into a contract with Spears Construction Company, Inc. regarding the construction of two chicken houses to be completed pursuant to ConAgra's specifications. The Kirkhams deposited money via wire transfer into a checking account maintained by Spears Construction Company, Inc. Under the terms of the contract, Spears Construction Company, Inc. was to pay for all necessary labor and materials with those funds. However, at the time of his arrest in May of 2000, the parties had encountered problems with regard to the completion of the contract and some liens were filed by sub-contractors and material suppliers with regard to the construction project.

The defendant was initially charged by bill of information with one count of misapplication of

payments as set forth in La. R.S. 14:202 with said misapplication being greater than $1,000.00. The defendant entered a plea of not guilty to the charge.

On July 29, 2003, the parties appeared for trial. Prior to the trial commencing, the State moved to amend the bill of information to reflect the amount of misappropriation to be in excess of $10,000.00 to which the defendant objected. Said amendment was allowed and then followed by the State moving for a continuance due to the absence of an out of state witness which was granted over defense objection. Trial in this matter was refixed for October 27, 2003 and held on that date through October 30, 2003. The jury returned a verdict of "guilty as charged". The defendant was sentenced to serve four years at hard labor in addition to paying a fine of $500.00 and all costs of the proceedings. A condition of his parole is that he pay the sum of restitution in the amount of $103,804.22. A motion to reconsider sentence was made and denied by the Trial Court. The matter was timely appealed to the Second Circuit Court of Appeal which reversed the decision of the jury and found the defendant not guilty.

The State of Louisiana applied for writs to this Honorable Court which writs were granted and ultimately the decision of the Court of Appeal was reversed by this Honorable Court and remanded.

On remand, the Court of Appeal rejected the other assignments of errors and arguments made by defendant and affirmed the conviction.

On November 14, 2006, this Honorable Court acknowledged receipt of the Application for Writs from the decision of the Court of Appeal filed by defendant.

On August 31, 2007, 9&1/2 months following the filing of the Application for Writs in this matter this Honorable Court denied same.

ASSIGNMENT OF ERRORS

This Honorable Court erred as follows:

1. THIS HONORABLE COURT ERRED IN AFFIRMING THE DECISION OF THE COURT OF APPEAL.

2. THIS HONORABLE COURT ERRED IN FAILING TO TIMELY DECIDE THE CASE.

3. THIS HONORABLE COURT ERRED IN DENYING DEFENDANT DUE PROCESS.

ARGUMENT AND LAW

1. THIS HONORABLE COURT ERRED IN AFFIRMING THE DECISION OF THE

COURT OF APPEAL.

The original Application for Writs in this matter set forth in detail the position of defendant and is a matter of record before this Honorable Court. Therefore, we will not repeat same except to point out the constitutional violation under *Blakely vs.*

Washington, 542 U.S. 296; 124 S. Ct. 2551; 159 L. Ed. 2nd 403, U.S. LEXIS 4573 and 72 U.S.L.W. 4546.

2. THIS HONORABLE COURT ERRED IN FAILING TO TIMELY DECIDE THE CASE.

The failure to render a decision to either grant or deny the Application for Writs herein violates the Rules of this Honorable Court. There are numerous Rules of this Honorable Court which are called into play in this matter.

"Louisiana Courts of Appeal should resolve cases expeditiously." See Louisiana Supreme Court Rules, Part G, Section 10, 2.4.

Louisiana Supreme Court Rules Part G, Section 10, Performance Standard 2.3 states:

> "The Supreme Court of Louisiana should resolve cases expeditiously."

Louisiana Supreme Court Rules Part G, Section 6, III states as follows:

> "No more than 70 days should elapse, under normal and usual circumstances, between the argument and the rendering of the opinion."

Louisiana Court Rules Part G, Section 6, I:

> " No more than 120 days should elapse, under normal and usual circumstances, between the filing and the grant or denial of any writ application other

than a criminal *pro se* post conviction writ application . . ."

Footnote 4 to Louisiana Supreme Court Rule G, Section 6 states:

". . . all cases which have been fully submitted and under advisement for longer than 30 days, together with an explanation of the reasons of any delay and an expected date of decision" must be submitted to the judicial administrator."

In fact, if the District Court keeps the matter under advisement for more than 30 days, a party can file for the District Judge's salary to be cut off.

This Honorable Court has very strict rules for filing of pleadings before this Court that are enforced.

Writs in this matter were denied without any comment of any nature, no dissents with one word "denied." All seven justices voted to deny the writ after 9&1/2 months.

Obviously these were "normal and usual circumstances."

Whereas, according to the Rules of this Honorable Court, a decision should have been rendered to either grant or deny writs within 120 days, it took 285, almost 2&1/2 times the time allotted by this Court's own rules.

3. THIS HONORABLE COURT ERRED IN DENYING DEFENDANT DUE PROCESS.

The right to a speedy trial or judicial determination at every level is guaranteed by both the Federal and State Constitutions. See U.S. Const. Amendment 6, La. Const. Art. I, Section 16.

That the defendant herein had a fundamental constitutional right to a speeding determination of his Application for Writs. If the District Court had held this matter under advisement for 9&1/2 months, the District Court would have already been disciplined by this Honorable Court, if reported.

In support of our position herein see *Barker vs. Wingo Warden*, 407 U.S. 514; 92 S. Ct. 2182; 33 L. Ed. 2nd 101; 1972 U.S. LEXIS 34.

This Honorable Court has reasonable times built into its Rules which simply have been ignored herein.

We have not found any case directly on point on this issue but it raises a grave constitutional issue, when this Honorable Court does not follow its own Rules.

Although the U. S. Supreme Court affirmed the conviction in the *Barker* case there was some discussion about whether or not the petitioner in *Barker* had waived any claims. There is no way in this case that defendant herein waived anything because he simply had no control over it and we can find no mechanism in the Rules of this Honorable

Court whereby this Court could have been mandamused to render a decision.

We would note that the ultimate decision in *Barker* has been criticized and distinguished, but not the constitutional issues.

As stated in *Barker*, the primary burden, in a case of this nature would be on this Honorable Court. Contrary to the *Barker* decision, in this case, as we have pointed out, the defendant had nothing to do with the delay.

As pointed out in the *Barker*, by Justice White and Justice Brennan, a delay may seriously interfere with the defendant's liberty or in this case, with "other rights." One of the factors to be considered in this matter would be the defendant's "anxiety and concern."

It would appear that an evidentiary hearing in this matter would be required. However, there is simply no procedure before this Honorable Court to have an evidentiary hearing.

In many cases, the delay can be blamed upon the defendant. However, in this case, the blame falls solely on this Court.

We would further note that this Honorable Court indicates that *State vs. Reaves*, 376 So. 136 (La. 1979) held that the delay of 3&1/2 months was sufficient to violate the defendant's rights.

Respectfully submitted,

CULPEPPER & CARROLL, PLLC
ATTORNEYS AT LAW
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PHONE: (318) 259-4184

BY: _____
BOBBY L. CULPEPPER
BAR ROLL #4646

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA	: SUPREME COURT
VERSUS LOUISIANA	: STATE OF
JACK S. SPEARS	: DOCKET NO. 2006-K-2704

MOTION TO RECUSE SUPREME COURT
FILED ON BEHALF OF JACK S. SPEARS

NOW INTO COURT, through undersigned counsel, comes JACK S. SPEARS, who, with respect, shows and avers as follows:

1.

The facts of this case, are as set forth in the Application for Rehearing.

2.

Except for the issue as to whether or not the denial of writs by this Honorable Court was correct, two other issues are involved herein:

(1) A delay of 9&1/2 months or almost 2&1/2 times the period set forth by the Rules of this Honorable Court when the decision should be rendered unless there were unusual circumstances;

(2) Did this Honorable Court violate defendant's due process rights.

3.

Obviously this Honorable Court cannot in good conscience rule on the above two issues.

4.

Consequently, this Honorable Court should be recused and a seven panel court be appointed in accordance with law to handle the instant Application for Rehearing.

WHEREFORE, defendant prays that this Honorable Court be recused and that a seven judge panel be appointed by this Court to consider and dispose of the Application for a Rehearing.

FURTHER PRAYS for all necessary orders and for just and equitable relief.

Respectfully submitted,

CULPEPPER & CARROLL,PLLC
ATTORNEYS AT LAW
525 EAST COURT AVENUE
JONESBORO, LOUISIANA 71251
PHONE: (318) 259-4184
BY: _____
BOBBY L. CULPEPPER
BAR ROLL #4646

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been mailed, this date, in the United States mail, postage prepaid, to Honorable Second Circuit Court of Appeal, P. O. Box 1528, Shreveport, Louisiana, 71165-1528 and Honorable Robert W. Levy, District Attorney, P. O. Box 777, Ruston, Louisiana, 71273.

Jonesboro, Louisiana, this the _____ day of _____, 2007.

_____
BOBBY L. CULPEPPER

STATE OF LOUISIANA

NO. 2006-K-2704

VS.

JACK S. SPEARS

IN RE: Spears, Jack S.; -- Defendant; Applying for Reconsideration of this Court's Action dated August 31, 2007; Parish of Lincoln, 3rd Judicial District Court, Div. A., No. 46498; to the Court of Appeal, Second Circuit, No. 39,302-KA.

November 21, 2007

Reconsideration denied.

CDT
PFC
CDK
BJJ
JPV
JTK
JLW

Supreme Court of Louisiana

_____

Signed/Deputy Clerk of Court
For the Court